S. K. Whitty and Company, Inc. *and* International Union of Operating Engineers, Local 673, and Florida State Council of Carpenters, AFL–CIO, Jointly, Petitioner. Case 12–RC–7360

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The key issues in this case are (1) whether the Board should apply a voter eligibility formula based on past employment and reasonable expectancy of future employment in a case where an employer has no committed work for the immediate future; and (2) if so, what formula should be used.

On September 21, 1990, the Regional Director for Region 12 issued a Decision and Direction of Election in which he found that there was a degree of continuity in the Employer's work force, which was sufficient to warrant directing an election among employees who met the requirements of an eligibility formula based on the number of days worked for the Employer during a 1-or 2-year period.[1] The Employer filed a timely request for review of the Regional Director's decision arguing, inter alia, that the Regional Director erred in applying the eligibility formula in circumstances where no work is planned for the immediate future. We grant the Employer's request for review, as it raises a substantial and material issue.

The Board has considered the entire record in this case and finds the following:

For the reasons set forth below, we find that it is appropriate in this case to apply an eligibility formula, based on past employment and reasonable expectancy of future employment. Because, however, we are modifying the eligibility formula for elections involving construction employers who engage in project-by-project hiring (and overruling *Daniel Construction* to the extent that the formula set out there differs from the one described below), we reverse the Regional Director with respect to his application of the *Daniel Construction* formula. As explained below, our modifications are intended to produce a formula more likely to identify employees with a reasonable expectancy of future employment with the employer in question.

The essential facts are as follows. The Employer is a contractor engaged in manufacturing concrete, steel, or lumber piles at its yard facility in Clermont, Florida, and installing them with a piledriver at construction jobsites. The Employer is a Louisiana corporation which established its Florida facility in February 1990 after taking a 2-year lease on the office and yard property.

The Employer generally secures field work through competitive bids. It has performed such work at sites throughout the State of Florida. The field work is performed by crews which usually include a foreman, one to three piledrivers and a crane operator. Depending on the number of pilings to be driven, the Employer's projects are completed within periods ranging from 2 to 7 weeks. With a total complement of approximately 12 employees, the Employer typically performs only one or two projects at a time.

After a project is completed, the most productive employees are used on successive projects when possible. The Employer's general superintendent retains on file the names of such employees to contact as needed for future jobs. The record shows that a number of employees, including Nicosia, Thibodeaux, Crowe, Goode, Funke, Strickland, and Purcell have been employed by the Employer on various projects over the past year or more.

At the time of the hearing, the Employer had three committed projects. The Solid Motor Assembly Building project using 11 or 12 employees was to have been completed by the first week of September 1990. The Employer then had a 5-or 6-week job scheduled at the Orlando International Airport. After completion of the airport project in mid-October 1990, the Employer had a job committed at St. Vincent's Medical Center in Jacksonville, Florida, which was to have been completed in the third week of November 1990. There was no work successfully bid or committed after the Medical Center job.

The Employer's general manager testified that the Employer has no present plans to vacate its Florida facility. It is searching for work and will continue to submit bids. At the time of the hearing, the Employer was preparing a bid for a project of about 6 weeks in North Carolina, which would be performed by the Florida division. However, it had unsuccessfully bid the same or a related project before and was dubious of a contract award on the current bid. The Employer's general manager stated that the Employer desires to maintain its business in Florida, but lack of substantial business over 5 or 6 months, due to a continuing slump in construction activity, could lead to its withdrawal from the State.

The first issue on review is whether any eligibility formula should be applied where an employer has no successful bids or committed work for the immediate future. The Employer asserts that the absence of any commitments for future work establishes that none of the employees previously in its employ have a reasonable expectation of future employment. It argues that the Regional Director's application of an eligibility formula in such circumstances allows laid-off employ-

[1] The Regional Director applied the eligibility formula set forth in *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078, 1081 (1967).

ees with no reasonable expectation of future employment to vote. We find the record does not support this argument.

Although the Employer has no commitments for future work, it had three secured projects at the time of the hearing. The Employer, therefore, has not experienced a long period of lack of work which might support a prediction that it would not obtain future work.[2] Further, the Employer stated that it was planning to bid on future work, had already prepared bids for some projects, and has no present plans to vacate the Florida facility. These circumstances do not differ greatly from those of many other construction industry employers who must obtain work through competitive bidding. There may be periods when bids are not won and when work slows down or becomes intermittent. We find that these conditions do not establish that employees who have previously worked for the Employer have no reasonable expectation of future employment.

Further, we find that the history of the Employer's Florida division clearly supports the use of an eligibility formula based on past employment and the reasonable expectancy of future employment. The Employer retains on file the names of the most productive employees and attempts to use them on future projects when possible. Several employees who were on the payroll at the time of the hearing had worked for the Employer on other projects over the past year or more. There is, therefore, evidence that the Employer uses some of the same employees from project to project. On the basis of the above-described circumstances, we conclude that, for purposes of determining eligibility to vote in the election to be held here, it is appropriate to use a formula that will identify certain individuals in addition to any who worked for the Employer during the payroll period preceding the Decision and Direction of Election, i.e., one that will identify those whose pattern of work is sufficient to suggest a continuing interest in the Employer's conditions of employment. For the reasons that follow, we conclude that the *Daniel Construction* formula, used by the Regional Director in accordance with Board precedent, does not adequately identify such employees.

In *Daniel Construction*, the Board observed that construction employees may experience intermittent employment, work for short periods of time on different projects, and work for several different employers during the course of a year. It found that many such employees may nevertheless work sufficiently long for an employer to have a continuing interest in its working conditions which would warrant their participation in a representation election. The Board then fashioned an eligibility formula based on the number of days worked in a 1- or 2-year period.[3]

The central purpose of the Board in devising the *Daniel Construction* formula was to identify individuals who formed a core group of employees to whom the employer was likely to turn on a fairly regular basis or who otherwise had a reasonable expectation of reemployment with the employer. Thus, in devising that formula, the Board rejected both the employer's proposal that only those who had worked for 6 months immediately prior to the Direction of Election should be eligible to vote and the petitioner union's proposal that any employee who had worked 5 days for the employer during the year preceding the election should be eligible. The Board found that the employer's proposal would inappropriately disenfranchise employees with a reasonable expectation of future employment with the employer, while the union's proposal would allow employees to vote who had no such reasonable expectation.

We continue to endorse the purposes for which the Board constructed the *Daniel Construction* formula, but we have concluded that it falls short of serving those purposes because it is somewhat over inclusive. In particular, we believe that, at least when employment with the employer for a period of less than 90 days is concerned, evidence of something more than one-time employment during the last year or two is required in order to assure that the voters are limited to those with a reasonable expectation of future employment with the employer. Thus, for example, we would not find that an employee who worked 30 days for the employer on one project 12 months ago is, by virtue of that fact alone, an employee with the requisite reasonable expectation. Rather, we would add a recurrency factor and conclude that unless such an employee had been recalled to work on at least one other occasion, the employee has no reasonable expectation of continued employment and therefore lacks an interest in the employer's conditions of employment sufficient to warrant inclusion in the voting group.

Contrary to the assertion of our dissenting colleagues, we are not changing the *Daniel* principle. That principle is that a formula should be used to determine those employees who have a reasonable expectation of reemployment by a construction industry employer who hires on a project-by-project basis. As noted, we continue to endorse that principle. Our sole difference with our dissenting colleagues concerns the precise formula that is to be applied. Our colleagues believe

[2] There was a period from September 1989 to the end of 1989 when no work was done in the Florida division. However, this was due to a suspension of work on the long-term job at Orlando International Airport because of delay in securing environmental permits.

[3] Under that formula, all unit employees are eligible if they have been employed for a total of 30 days or more within the 12-month period immediately preceding the eligibility date for the election, or have had some employment in that period and have been employed 45 days or more within the 24-month period immediately preceding the eligibility date. Employees who voluntarily quit or were terminated for cause prior to the completion of the last job for which they were employed are not eligible under the formula.

that an employee establishes a reasonable expectancy of reemployment upon a bare showing that he or she worked 30 days on a project 12 months ago. We disagree that such a bare showing would establish the requisite expectancy.

In the absence of recurrent employment, a single period of employment may, however, be of sufficient duration to indicate a likelihood that the employee will work again for the employer. For example, an employee who was laid off shortly before the eligibility date but who had worked for several months for the employer should not be excluded from voting merely because he or she had only one period of employment with the employer. Such a sustained single period of employment is a valid indicator of reasonable expectancy of future employment.[4] The *Daniel Construction* figure of 30 days, however, is too short a period of employment to identify adequately employees in this category. On balance, based on our expertise, we conclude that a single period of employment of at least 90 days in the year preceding the eligibility date is a period of sufficient duration to indicate a likelihood of future employment under this aspect of the test.

Accordingly, we shall revise the formula to include the factor of recurrent employment or a single period of at least 90 days of employment. Thus, in addition to employees meeting the standard eligibility criteria,[5] we shall find eligible all employees in the unit (1) who have been employed for at least two periods of employment cumulatively amounting to 30 days or more in the 12-month period immediately preceding the eligibility date, *or* (2) who have had some employment in the 12-month period and have had at least two periods of employment cumulatively amounting to 45 days or more in the 24-month period immediately preceding the eligibility date, *or* (3) who have had one period of employment of 90 days or more in the 12-month period immediately preceding the eligibility date.[5]

ORDER

It is ordered that Case 12–RC–7360 is remanded to the Regional Director for Region 12 for action consistent with this decision.

MEMBERS CRACRAFT and DEVANEY, dissenting.

Contrary to the majority, we would not disturb the longstanding *Daniel Construction* eligibility formula.[1] For 30 years the Board has successfully applied the basic *Daniel* formula without substantial modification. We see no good reason at this time to modify this well-established principle. Many construction industry employers continue to hire employees on an intermittent basis from a limited pool of prospective employees, there is no evidence that the existing formula has failed in its purpose, and our colleagues offer no empirical evidence justifying the new formula they assert today.

The special employment patterns present in the building and construction industry have required the development of special representational procedures for the industry. The representational problems inherent in the industry were recognized by Congress in enacting the 1959 amendments to the Act. ''Representation elections in a large segment of the industry are not feasible to demonstrate such majority status due to the short periods of actual employment by specific employers.'' S.Rep., 1 Leg. Hist. 451–452. In the first *Daniel* case the Board decided that a special eligibility formula was necessary in the construction industry. Many employees in the industry experience intermittent employment, may work for short periods on many different projects and for several different employers during the course of a year, and on any particular project may be laid off for varying periods due to material shortages or to the flow of work on the project. Thus, the Board decided that an employee who worked intermittently but for a significant period for a particular employer had a sufficient continuing interest in working conditions to be eligible to participate in an election.

The first *Daniel* case held that unit employees who have been employed for a total of 30 days or more in the past 12 months or who have had some employment in that period and who have been employed 45 or more days within the past 24 months are eligible to vote in a representation election. The Board decided, in effect, that those employees meeting the formula had a reasonable expectancy of future employment and should be included in the unit. Although the Board did not explicitly state why it chose 30 and 45 days, such periods would give an employer sufficient time to evaluate whether the employer would rehire (or accept referral of) the employee. The second *Daniel* case reaffirmed the 30/45 day formula but added that employees who were discharged for cause or quit before completion of a project were not eligible. The apparent reason for this modification is that employers would be unlikely to rehire such employees.

Project-by-project employment is still sufficiently common in the construction industry to require the use of a special eligibility formula to provide for meaningful organization and representation in much of the in-

[4] An employer's retention of an employee for a sustained period of time suggests that the employer is satisfied with that employee's work and, depending on its employment practices, the likelihood that it will recall the employee in the future.

[5] For example, employees hired and working on the election eligibility date would, of course, be eligible to vote regardless of how long they had previously worked for the employer. See, e.g., *NLRB v. Tom Wood Datsun*, 767 F.2d 350, 352 (7th Cir. 1985), and cases there cited.

[6] Employees who have been terminated for cause or have quit voluntarily prior to the completion of the last job for which they were employed are not eligible to vote.

[1] *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified 167 NLRB 1078 (1967).

dustry. In our opinion, the majority's modification of the *Daniel* formula not only unnecessarily changes well established precedent, but also seriously erodes employees' rights to engage in meaningful organization.

The majority today modifies the established *Daniel* formula by adding to the 30/45-day standard the requirement that the employee must also have at least two periods of employment with the employer. The second modification would require an employee who has worked only once in the past year to have a period of employment of 90 days or more.

The majority offers no justification for this departure from precedent except to assert that employment for a period of less than 90 days requires evidence of more than one-time employment to assure that voters are limited to those with a reasonable expectation of future employment with the employer. The majority cites no concrete evidence supporting their assertion. Furthermore, the majority misconstrues *Daniel* to the extent they consider its purpose ''was to identify individuals who formed a core group of employees.'' *Daniel*, however, was meant to apply to employees who work for employers without core groups of employees, i.e., employers that hire, through hiring halls or from a pool of skilled workers, new employees for each new project, as well as to employees who work for employers that retain core groups, i.e., employers that seek to rehire some or most former employees. We believe this misconstruction leads our colleagues to ignore the common practice of intermittent, project-by-project employment that *Daniel* was designed to address.

The requirement that an employee work for an employer more than once in the relevant period is an unrealistic impediment to organization in much of the industry. How often any particular employee works for an employer will frequently depend on the number and size of projects an employer undertakes during the relevant period and on the size of the available work force. Because many of the smaller employers in the industry engage in relatively few and small projects during the course of a year, few if any employees may work on more than one project.[2] Thus, a likely impact of the newly announced formula will be to limit meaningful organization to employees of large contractors that operate multiple projects during the course of a year and would be likely to work their way through the pool of qualified craftsmen several times in the course of a year.[2]

The new alternative eligibility requirement of a single period of employment of at least 90 days is, we believe, similarly unrealistic for much of the industry. Not all projects in the industry last for 90 days. Even in substantially longer projects, the need for a particular craft or subcontractor is often less than 90 days.[4] The likely impact of this modification would be to limit meaningful organization to employees who work on large projects or who belong to a craft that works for the duration of a project.

We believe that the existing *Daniel* eligibility formula remains as valid today as it did 30 years ago. The majority cites no significant change in the industry or other substantial reason that would justify departure from such long established precedent. Changing well-established Board principles without substantial justification goes far toward undermining the Board's credibility as an institution. Upon a thorough examination of the issue, we are not persuaded that the original voting eligibility formula, as set forth in the Board's 1961 *Daniel* decision, requires modification. Because we see no compelling reason to modify the *Daniel* eligibility formula, we would not now do so.

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[2] And the projects may be of such short duration that there is otherwise insufficient time to hold an election.

[3] The majority's position would also disenfranchise many employees who have only recently begun working in construction or who work for newly formed employers.

[4] For example, a project requiring 90 days of continuous electrical work would be a large project indeed.